IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
August 3, 2009 Session

JEFFREY ADAIR YOUNG v. GARY DAVIS, ET AL.

Appeal from the Chancery Court for Bradley County
No. 05-292 Jerri S. Bryant, Chancellor

No. E2008-01974-COA-R3-CV - FILED OCTOBER 30, 2009

After being discharged as the director of emergency management for Bradley County, Jeffrey Adair Young ("the Plaintiff"), filed this suit in chancery court against the county mayor and others. The Plaintiff alleges that the defendants conspired to end his employment through actions that (1) amounted to common law retaliatory discharge and (2) were in violation of the Tennessee Public Protection Act ("the Public Protection Act" or "the Act") codified at Tenn. Code Ann. § 50-1-304 (2009). A series of filings and orders eliminated all claims except those against the county mayor, Gary Davis, in his *official* capacity. An amended complaint, again filed in chancery court, added Bradley County as a defendant. Davis and Bradley County will be referred to herein as "the Defendants." The Defendants filed a motion to dismiss on the ground that circuit court had exclusive jurisdiction under Tenn. Code Ann. § 29-20-307 (2000). The Defendants also filed a motion for summary judgment on numerous bases. The Plaintiff filed a response to the motion as well as his own motion to transfer the case to circuit court pursuant to Tenn. Code Ann. § 16-1-116 (2009). The chancery court granted the Defendants' motion for summary judgment and dismissed the case, stating that the motion to transfer was rendered moot by its judgment of dismissal. The Plaintiff appeals. We vacate the judgment of the chancery court and remand with instructions to transfer the case, in its entirety, including the Plaintiff's claims against original defendants Dewey Woody and Troy Spence, to circuit court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Vacated; Case Remanded

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and D. MICHAEL SWINEY, J., joined.

Michael M. Raulston, Chattanooga, Tennessee, for the appellant, Jeffrey Adair Young.

Jeffrey M. Atherton, Chattanooga, Tennessee, for the appellees, Gary Davis and Bradley County.

OPINION

I.

The Plaintiff initiated this litigation in chancery court on November 21, 2005, by filing a complaint that alleges he was "discharged in violation of [the] Public Protection Act of Tennessee, T.C.A. § 50-1-304[1] [and] pursuant to the common law tort of retaliatory discharge and civil conspiracy." (Footnote added.) The date of discharge was November 23, 2004. The original complaint names Gary Davis, Dewey Woody and Troy Spence ("the original defendants") as

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[1]The text of the Act, as pertinent, is as follows:

(a) As used in this section:

(1) "Employee" includes, but is not limited to:

(A) A person employed by the state, or any municipality, county, department, board, commission, agency, instrumentality, political subdivision or any other entity of the state;

(B) A person employed by a private employer; or

(C) A person who receives compensation from the federal government for services performed for the federal government, notwithstanding that the person is not a full-time employee of the federal government;

(2) "Employer" includes, but is not limited to:

(A) The state, or any municipality, county, department, board, commission, agency, instrumentality, political subdivision or any other entity of the state;

(B) A private employer; or

(C) The federal government as to an employee who receives compensation from the federal government for services performed for the federal government notwithstanding that the person is not a full-time federal employee; and

(3) "Illegal activities" mean activities that are in violation of the criminal or civil code of this state or the United States or any regulation intended to protect the public health, safety or welfare.

(b) No employee shall be discharged or terminated solely for refusing to participate in, or for refusing to remain silent about, illegal activities.

(c) [Deleted by 2009 Pub.Acts, c. 161, § 1, May 7, 2009.]

(d)(1) Any employee terminated in violation of subsection (b) shall have a cause of action against the employer for retaliatory discharge and any other damages to which the employee may be entitled.

(2) Any employee terminated in violation of subsection (b) solely for refusing to participate in, or for refusing to remain silent about, illegal activities who prevails in a cause of action against an employer for retaliatory discharge for the actions shall be entitled to recover reasonable attorney fees and costs.

* * *

defendants without providing any details as to what the individual defendants did wrong. The complaint demands compensatory and punitive damages.

The original defendants filed a motion to dismiss which admitted Davis fired the Plaintiff but claimed it was done in the best interest of the county after the Tennessee Bureau of Investigation investigated Young's activities and secured his indictment for illegal activities in office. The motion invokes the Governmental Tort Liability Act and argues that the complaint states no facts that support the pleading's conclusions.

The chancery court granted the motion to dismiss as to Mayor Davis in his individual capacity and as to Woody and Spence in both their individual and official capacities. The court instructed the "parties to set [the] case for further argument on the issues of relation back, statute of limitation, and suit against Bradley County." After a motion to reconsider by the Plaintiff and a motion to dismiss Davis in his official capacity were filed, the trial court entered an order reaffirming its dismissal of Spence and Woody with full prejudice, reaffirming its dismissal of Davis in his individual capacity with full prejudice, dismissing all claims under the Public Protection Act, and granting the Plaintiff leave to amend to name Bradley County as a defendant. The court expressly reserved ruling on whether the statute of limitations had expired and whether an amended complaint adding Bradley County would relate back to the filing of the original complaint.

Plaintiff filed his amended complaint[2] on May 23, 2008. In it, he named Gary Davis, in his official capacity, and Bradley County, as defendants. The amended complaint is short enough and important enough to the resolution of this case to repeat the allegations in their entirety:

> 1. On or about November 23, 2004, the Plaintiff was fired from his employment at Cleveland/Bradley Emergency Management Agency.
>
> 2. The Plaintiff filed for unemployment benefits, and they were awarded.
>
> 3. The Plaintiff would show that the Defendant, Gary Davis in his official capacity as Mayor of Bradley County acting on behalf of Bradley County acted illegally and beyond his authority and the authority of Bradley County in undertaking to deprive the Plaintiff of his employment and did that in violation of the Plaintiff's rights causing emotional distress.

[2] Apparently the plaintiff tendered the amended complaint to the court along with a motion to amend filed on November 16, 2007. There appears to be some question whether and when the motion was served on opposing counsel. The resolution of this dispute is not germane to our disposition of this appeal.

> 4. The Plaintiff would further show that Gary Davis in his official capacity as Mayor of Bradley County is in fact acting on behalf of Bradley County.
>
> 5. Pursuant to Tenn. Code Ann. § 50-1-304(b) the Plaintiff would show Thirteen Thousand ($13,000.00) Dollars of his salary was supplemented by the Federal Government through the Federal Emergency Management Agency (FEMA).
>
> 6. The Plaintiff complained to Gary Davis, Mayor of Bradley County, in his official capacity about property being taken from his, the Plaintiff's, office without permission and sought relief and Gary Davis, in his official capacity refused to take any action against the parties responsible.
>
> 7. As the result of the Plaintiff's complaints, the wrongs sustained by the Plaintiff, he has suffered a negligent infliction of emotional distress by being deprived of his property, his privacy and by the County's refusal to take appropriate action.

The amended complaint sought only compensatory damages.

The Defendants responded to the amended complaint with a motion to dismiss in which they argued that all claims sounded in wrongful discharge and fell "under the terms and provisions of the Tennessee Governmental Tort Liability Act, T.C.A. § 29-20-101 et seq. [(2000 & Supp. 2009)]" and that "only [c]ircuit [c]ourts have exclusive original jurisdiction over any action brought under the [Tennessee Governmental Tort Liability Act]" (referred to herein as "the GTLA"). The Defendants asserted that the chancery court was without "jurisdiction over the subject matter of this lawsuit." The Plaintiff then filed a motion to transfer "pursuant to Tenn. Code Ann. § 16-1-116."[3] The Defendants responded to the motion to transfer by arguing that it was not in the interest of justice,

[3]The text of the transfer statute, Tenn. Code Ann. § 16-1-116, is as follows:

> Notwithstanding any other provision of law or rule of court to the contrary, when an original civil action, an appeal from the judgment of a court of general sessions, or a petition for review of a final decision in a contested case under the Uniform Administrative Procedures Act, compiled in title 4, chapter 5, is filed in a state or county court of record or a general sessions court and such court determines that it lacks jurisdiction, the court shall, if it is in the interest of justice, transfer the action or appeal to any other such court in which the action or appeal could have been brought at the time it was originally filed. Upon such a transfer, the action or appeal shall proceed as if it had been originally filed in the court to which it is transferred on the date upon which it was actually filed in the court from which it was transferred.

a requirement of the statute to transfer, in light of the protracted nature of the litigation and the pending motions.

Shortly after filing their motion to dismiss for lack of subject matter jurisdiction, the Defendants filed their motion to dismiss "and/or" for summary judgment on the following paraphrased grounds:

> Failure to state a claim;
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> Expiration of the statute of limitations against Bradley County;
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> Official capacity suit against county mayor is redundant to suit against the county;
>
> Insufficiency and lack of service of process pursuant to Tenn. R. Civ. P. 12.04 (4) and (5);
>
> Immunity from suit under the doctrine of sovereign immunity and GTLA;
>
> This was a discretionary function.

The motion was supported by the affidavit of Mayor Davis which stated to the effect that the Plaintiff was an at-will employee appropriately removed within the discretion of Davis in the best interest of Bradley County.

The Plaintiff responded with his own affidavit stating that he was fired for an illegal reason, *i.e.*, his sexual orientation, being "because of my having a boyfriend and for no other reason." The Plaintiff also made some cursory legal arguments against the motion.

The substance of the trial court's order granting summary judgment is as follows:

> After a review of the file and considering argument of counsel, the court hereby finds that the statute of limitations with regard to this claim is clearly expired. To the extent that the Complaint filed in this matter alleges negligent termination or a negligent act on behalf of County Mayor Gary Davis, the firing of Plaintiff in this matter was a discretionary function which removes liability from Defendant Davis. This leaves the only claim pending at this point by the Plaintiff for negligent infliction of emotional distress against Defendant. In the face of the Motion for Summary Judgment, it is the duty on behalf of the Plaintiff to come forward with some evidence to support all

> elements of his cause of action. He has failed to do so. Therefore, this court grants the Motion.

The Plaintiff then filed a notice of appeal.

II.

The issues, as stated by the Plaintiff, are:

> Whether the Court wrongfully failed to transfer the case once it was shown the Court had no jurisdiction;
>
> Whether the Court improperly dismissed the suit against all defendants.

III.

The issues we address are all issues of law, and, accordingly, we review them *de novo* with no presumption of correctness attaching to the trial court's conclusions of law. ***Ganzevoort v. Russell***, 949 S.W.2d 293, 296 (Tenn. 1997).

We believe the outcome of this case is controlled by ***Flowers v. Dyer County***, 830 S.W.2d 51 (Tenn. 1992), even though neither party mentioned the case, much less cited it as controlling authority. ***Flowers*** involves a GTLA lawsuit filed against Dyer County in chancery court. Dyer County filed a motion to dismiss arguing that chancery court lacked subject matter jurisdiction to hear a GTLA suit. The chancery court denied the motion and Dyer County was granted an interlocutory appeal to this Court. We reversed the judgment of the trial court and directed the dismissal of the lawsuit. We based our ruling on the requirement that GTLA actions be "brought in strict compliance with the terms of [the GTLA]", Tenn. Code Ann. § 29-20-201(c), and the exclusive original jurisdiction of circuit courts over GTLA actions established by the following language in Tenn. Code Ann. § 29-20-307(a): "The circuit courts shall have exclusive original jurisdiction over any action brought under this chapter . . . ."

The Supreme Court agreed with our rationale, but disagreed with our relief in the case, holding that, once the motion to transfer was made, transfer, rather than dismissal, was mandatory. ***Id*** at 53. The High Court stated the following:

> T.C.A. § 16-11-102, first enacted by the Public Acts of 1877, Chapter 97, provides the following procedures for chancery court jurisdiction of civil cases and transfer to the circuit court:
>
> (a) The chancery court has concurrent jurisdiction, with the circuit court, of all civil causes of action, triable in the circuit court, *except for unliquidated damages for injuries to person or character,* and

> *except for unliquidated damages for injuries to property not resulting from a breach of oral or written contract*; and no demurrer for want of jurisdiction of the cause of action shall be sustained in the chancery court, *except in the cases excepted*. (Emphasis supplied.)
>
> (b) Any suit in the nature of the cases excepted above brought in the chancery court, *where objection has not been taken by a plea to the jurisdiction*, may be transferred to the circuit court of the county, or heard and determined by the chancery court upon the principles of a court of law. (Emphasis supplied.)
>
> Implicit in the provisions of T.C.A. § 16-11-102 is the positive inference that where a jurisdictional objection has been made, such a transfer is mandated. . . .
>
> We are of the opinion that the Governmental Tort Liability statutes state a further limitation on chancery court jurisdiction under T.C.A. § 29-20-201(b), to the effect that when immunity is removed by the chapter any claim for damages must be brought in strict compliance with its terms. T.C.A. § 29-20-307 places exclusive, original jurisdiction in circuit court over any action brought under its terms, and that court shall hear and decide such suits without the intervention of a jury.

Id. at 52-53 (emphasis and parenthetical material in original). ***Flowers*** was followed by the Supreme Court in the case of ***Woods v. MTC Management***, 967 S.W.2d 800 (Tenn. 1998). In the latter case, the High Court said that an action filed "in chancery court when the governing statutory law required it to be filed in circuit court" must be transferred rather than dismissed. ***Id.*** at 802.

We acknowledge that the motion to transfer in this case was made pursuant to Tenn. Code Ann. § 16-1-116 and not § 16-11-102, but this makes no difference in the outcome. The operative language of both transfer statutes produces the same result, and the language of § 16-1-116, if anything, is more clearly mandatory in using the word "shall" than § 16-11-102 which uses the word "may." We are mindful that § 16-1-116 contains the proviso that the transfer should be "in the interest of justice," but in light of the holdings of ***Flowers*** and ***Woods***, we think that proviso must be interpreted liberally in favor of transfer and that the alternative should be, at worst, dismissal without prejudice so as to allow refiling in the correct court.

The Defendants argue that where a chancery court takes jurisdiction of a case for one purpose, it has jurisdiction for all purposes. *See* ***Industrial Dev. Bd. v. Hancock***, 901 S.W.2d 382, 384 (Tenn. Ct. App. 1995). We are not convinced that this general rule of law overcomes the express pronouncement in the GTLA that the waiver of immunity is effective only in strict compliance with the terms of the GTLA, whose terms place "exclusive original jurisdiction" in circuit court. We note that the Supreme Court's reading in ***Woods*** of its earlier decision in ***Flowers***, is that the chancery court in ***Flowers*** incorrectly exercised jurisdiction on the basis of general concurrent jurisdiction

with circuit court. ***Woods***, 967 S.W.2d at 801-02. Also, according to ***Sanders v. Lincoln County***, No. 01A01-9902-CH-00111, 1999 WL 684060 (Tenn. Ct. App., M.S., filed Sept. 3, 1999), and the cases cited therein, a chancery court is without jurisdiction over a case seeking damages against a governmental entity even when the chancery court has jurisdiction over other aspects of the case such as a claim for injunctive or declaratory relief. ***Id***. at *5-6. Thus, we hold that the chancery court was without jurisdiction over, in the words of the statute, "any [part of the] action brought under this chapter [20 of Title 29, *i.e.*, the GTLA]." Tenn. Code Ann. § 29-20-307. *See* ***Flowers***, 830 S.W.2d at 53 ("T.C.A. § 29-20-307 places exclusive, original jurisdiction in circuit court over any action brought under [the GTLA's] terms.").

Even if the general rule of concurrent jurisdiction were to be applicable in GTLA cases, which we have held it is not, all the claims in the present case, as in ***Flowers***, are for "unliquidated damages for injuries to person or character." Tenn. Code Ann. § 16-11-102. Therefore, in light of the Defendants' objection to subject matter jurisdiction, the chancery court was deprived of jurisdiction and obligated to transfer the matter in its entirety.

The Defendants argue that even if transfer of the GTLA part of the case was mandatory, the chancery court correctly dismissed all other claims. We are unable to agree. In the first place, the Defendants ignore their own objection as well as the unliquidated nature of all the other claims. As we have stated, the objection to jurisdiction and the nature of the claims left the chancery court without jurisdiction and powerless to act. *See* ***Computer Shoppe, Inc. v. State***, 780 S.W.2d 729, 734 (Tenn. Ct. App. 1989) (subject matter jurisdiction limits the court's power to hear a controversy and cannot be conferred by the parties' conduct).

In the second place, we believe that all of the claims in the present case are "brought under [the] terms" of the GTLA or "brought under this chapter [20, Title 29]." Both parties assume that claims against employees of governmental entities and Public Protection Act claims fall outside the realm of the GTLA; however, they have supplied no briefing as to whether those claims are or are not "brought" under Chapter 20. We conclude that all of the claims asserted in this case were "brought" under Chapter 20 of the Code.

The GTLA does more than simply set the boundaries for claims against governmental entities; it also establishes boundaries for claims against employees of governmental entities for actions related to their duties. The term "Claim" is defined under the GTLA to include "any claim brought against a governmental entity *or its employee*." Tenn. Code Ann. § 29-20-102 (1). (Emphasis added.) If an entity has waived immunity, an employee generally cannot be liable. Tenn. Code Ann. § 29-20-310 (b). Even if the entity has not waived immunity, the employee generally, with certain limited exceptions, cannot be sued for an amount in excess of the statutory cap for which the entity could be held liable. Tenn. Code Ann. § 29-20-310 (c). Members of boards and commissions are granted absolute immunity by the GTLA except for willful acts. Tenn. Code Ann. § 29-20-201. Finally, and perhaps most important for the purpose of our present discussion, a defendant who claims the benefit of the GTLA as an employee of a governmental entity has the right under the GTLA to a determination by the trier of fact as to whether he or she is an employee. Tenn. Code Ann. § 29-20-313 (a). "If the trier of fact determines that the defendant claiming immunity is not a governmental entity employee, the lawsuit as to that defendant shall proceed like any other

civil case. If the trier of fact determines that the defendant claiming immunity is a governmental entity employee, *the lawsuit as to that defendant shall proceed in accordance with the provisions of this chapter [20].*" ***Id.*** (emphasis added).

As to the Public Protection Act claim, the Plaintiff assumes that the statute which creates a private right of action against employers, including governmental entities, also removes that private right of action from the universe of the GTLA. It is clear to us that the GTLA and governmental immunity in general still sets boundaries applicable to retaliatory discharge claims and Public Protection Act claims. Retaliatory discharge claims that do not satisfy the elements of the Public Protection Act are subject to the GTLA. ***Baines v. Wilson County***, 86 S.W.3d 575 (Tenn. Ct. App. 2002). The GTLA prevents suits against governmental entities based on common law retaliatory discharge. ***Id.*** at 581, 583.

Further, it appears to us that even claims which satisfy the elements of the statute must be brought "in compliance" with the GTLA. In ***Farmer v. Tennessee Dept. of Safety***, 228 S.W.3d 96 (Tenn. Ct. App. 2007), this Court determined whether Public Protection Act claims could be saved from the applicable statute of limitations by the "saving" statutes found in Tenn. Code Ann. §§ 28-1-105 or 28-1-115 (2000). We held that the saving statutes did not apply because sovereign immunity protected the defendant, the State of Tennessee, from application of the saving statutes. ***Id.*** at 101. In reaching that conclusion, we quoted at length from cases decided under the GTLA, including the following passage which bears repeating here:

> The GTLA reaffirms the doctrine [of sovereign immunity] and merely removes immunity in certain limited and enumerated circumstances. *See* Tenn. Code Ann. § 29-20-201(a); *see also* ***Hawks v. City of Westmoreland***, 960 S.W.2d 10, 14 (Tenn. 1997). Consistent with this narrowly defined removal of immunity, "any claim for damages must be brought in strict compliance with the tems of [the GTLA]." Tenn. Code Ann. § 29-20-201(c). One of the terms of the GTLA which demands strict compliance is the statute of limitations.

Id. at 101 (*quoting* ***Lynn v. City of Jackson***, 63 S.W.3d 332, 338 (Tenn. 2001)) (bracketed material and quotation marks in original). We know from ***Farmer*** that sovereign immunity as codified in the GTLA sets parameters applicable to Public Protection Act claims. It follows that such claims must be brought in compliance with, "under [the] terms" of, ***Flowers***, 830 S.W.2d at 53, or "proceed in accordance with," the GTLA. Tenn. Code Ann. § 29-20-313.

A few concluding remarks are in order. We are mindful that the Plaintiff is getting a second chance caused by his own choice of the wrong court, but we are constrained by limitations on subject matter jurisdiction and the holding of ***Flowers***. The plaintiff in ***Flowers*** also filed in the wrong court. None of our comments herein should be taken as expressing an opinion as to the merits of this case. In fact, we do not comment as to whether the original complaint or amended complaint even states a claim against any or all defendants. In some situations, we might be inclined to move past the procedural questions to the merits, but to do so in this case would be to act in the first instance

as a trial court rather than an appellate court. We are sympathetic to the efforts of the chancellor in trying to dispose of the merits rather than passing her problems on to another court, but we are compelled to first answer the question of whether the chancery court had the jurisdiction to act. We conclude that it was without jurisdiction to act other than to transfer the case. On remand, the chancery court must enter an order transferring the case to circuit court for all purposes.

IV.

The judgment of the trial court is vacated. Exercising our discretion, we tax the costs on appeal to the appellees, Bradley County and Gary Davis. This case is remanded, pursuant to applicable law, with express directions to the chancery court to enter an order transferring all claims against all defendants, namely, Gary Davis, Dewey Wood, Troy Spence, and Bradley County, for all purposes, to circuit court for further proceedings consistent with this opinion.

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CHARLES D. SUSANO, JR., JUDGE